

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable William H. Orrick, Judge
4

5 SOFIE KARASEK, et al.,)
6 Plaintiffs,)
7 vs.) No. C 15-03717-WHO
8 THE REGENTS OF THE UNIVERSITY)
9 OF CALIFORNIA, et al.,)
10 Defendants.)

11 San Francisco, California
12 Tuesday, November 3, 2015

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
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1 Tuesday, November 3, 2015

4:36 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling civil matter 15-03717,
5 Karasek, et al., versus Regents of the University of
6 California.

7 Counsel, please come forward and state your appearance.

8 MR. PHILLIPS: Good afternoon, your Honor. Brad
9 Phillips and Thane Rehn of Munger, Tolles and Olson on
10 behalf of the Regents of the University of California.

11 THE COURT: Good afternoon.

12 MR. ZALKIN: Good afternoon, your Honor. Irwin
13 Zalkin on behalf of plaintiffs. And Alex Zalkin is here as
14 well.

15 MR. A. ZALKIN: Good afternoon, your Honor.

16 THE COURT: Sorry you had to sit through --

17 UNIDENTIFIED SPEAKER: An interesting afternoon,
18 your Honor.

19 UNIDENTIFIED SPEAKER: It's been quite a long
20 afternoon.

21 THE COURT: Yes. And so here you are.

22 So let me tell you sort of where I see this -- the
23 complaint, because I think there are some easy issues and I
24 think there is a hard issue.

25 And the easy ones, it seems to me is Education Code

1 section 220 doesn't apply to the Regents.

2 I don't think fraud is plausibly pled in this
3 complaint.

4 And the negligent failure to warn, train or educate, I
5 don't think I'm able to substitute my view on policy for the
6 University's. I don't think there's a duty and I think the
7 Juarez case is just different. Boy Scouts are different
8 than university students.

9 So those claims I don't see proceeding, although if you
10 tell me that you want to amend, I'll give you that
11 opportunity, Mr. Phillips.

12 The hard question to me and the one that I'm most
13 interesting in argument on is deliberate indifference on the
14 Title IX claim.

15 And here, I focus on the Regents' response after
16 learning of the assaults. And a common concern is that the
17 plaintiffs weren't regularly informed or weren't informed of
18 what the Regents were doing. And it seems to me that the
19 plaintiffs are entitled to know, entitled to discovery to
20 know so that the complaint -- either because the complaint
21 adequately states a claim so that we can determine whether
22 it's to think that it will.

23 It seems to me that it's close about whether you can
24 infer from the allegations regarding Ms. -- Karasek, is that
25 how to pronounce it?

1 MR. I. ZALKIN: Karasek.

2 THE COURT: -- Karasek and Ms. Commins, the
3 defendant, was late to respond, froze them out of the
4 process and reached an inadequate remedy. I mean it's
5 obviously also plausible that the Regents' interpretation of
6 the facts such as they are, are right and that it acted
7 within its procedures reasonably and promptly.

8 The separate issue with Ms. Butler is the one of
9 control. And there, I think it's plausible that the Regents
10 had sufficient control over John Doe, given that it
11 advertises the Alaska Wildlands program, he's a guest
12 lecturer at U.C., and the other allegations that are in
13 there.

14 And then the question on causation, which is another
15 interesting issue I think. But I don't agree with the
16 Regents' argument on causation. If the University's conduct
17 causes further discrimination, Title IX violation is still
18 viable. And it seems to me that there are a lot of
19 different ways to allege further discrimination. It's not
20 just another bad act of harassment.

21 So I'm inclined either to dismiss with leave to amend
22 and to give the plaintiff 90 days to do some discovery and
23 figure out what the University knew and when it knew it and
24 what it did or to deny the motion to dismiss on that issue
25 and look at it again on summary judgment.

1 But, Mr. Zalkin, why don't you start off.

2 MR. I. ZALKIN: Sure, your Honor. I'm going to
3 throw you a bit of a curve ball if I can.

4 We have two paths to liability in this case under Title
5 IX. We've focused very much in the briefing on the path of
6 how the University responded to the particular claims of the
7 three plaintiffs in this case.

8 But we have another path, and I want to just address
9 that first, if you don't mind, take a few minutes. And then
10 I will certainly answer your concerns or attempt to address
11 your concerns as you've stated them.

12 With respect to the first path, I'll call it -- it's
13 the policy path. And what we've alleged in our complaint --
14 specifically I think it's paragraph 69 through 78 of the
15 complaint -- are allegations that the University --
16 essentially the manner in which it has historically and
17 continues to respond to claims of sexual violence and gender
18 discrimination associated with sexual harassment and sexual
19 violence has been one of a policy of indifference.

20 And when you have a circumstance where you have this
21 overall policy of indifference to a known harassment, known
22 sexual violence on their campus in their community and they
23 have failed to respond to that, you can just sort of skip
24 past the need to have to have actual notice to a particular
25 individual with the authority to remedy the situation. You

1 go straight to court.

2 And there are two cases principally that I want to
3 address that stand for that proposition.

4 One is a Ninth Circuit case. And the Ninth Circuit
5 case we didn't cite in our brief, and I'm sorry that we
6 didn't. Often when you're preparing for these arguments,
7 you come across something that you should have included. So
8 it is hidden in there among other cases, but it wasn't
9 brought to the forefront.

10 That's the case of Mansourian -- M-A-N-S-O-U-R-I-A-N --
11 v. Regents of the University of California, 602 Fed.3d 957,
12 Ninth Circuit case.

13 And in that case, the Ninth Circuit held that where the
14 official policy of the recipient educational institution is
15 one of the deliberate indifference to a known overall risk
16 of sexual harassment, notice of a particular harassment
17 situation and an opportunity to cure it are not predicates
18 for liability. That's page 967 of the opinion.

19 Now, that was a case where the concern, the problem,
20 the issue was the University of California at Davis had shut
21 down a women's wrestling program. It was a program that was
22 part actually of the men's program and they allowed women to
23 wrestle and then they shut it down.

24 They were called on it by the OCR. They reinstated it,
25 but they made it so impossible for women to compete that

1 ultimately it faded. That was the issue in the case, the
2 particular issue. But the question that was raised in that
3 case was: Does there have to be actual knowledge to a
4 particular individual that has the authority to remedy the
5 situation and does there have to be this sort of continuing
6 subject to harassment to follow the lack of a remedy.

7 And the court said no. It looked to Davis and it
8 looked to Gebser, which was an earlier Supreme Court case.
9 So I'm going to just quote that page for you in -- because I
10 think it helps in what I'm trying to suggest.

11 "Proof of actual notice is required
12 only when the alleged Title IX violation
13 consists of an institution's deliberate
14 indifference to acts that, 'do not
15 involve official policy of the recipient
16 entity.' In sexual harassment cases, it
17 is the deliberate failure to curtail
18 known harassment rather than the
19 harassment itself that constitutes the
20 intentional Title IX violation."

21 And it cites Davis and it cites Gebser.

22 But then it goes on to say:

23 "The Tenth Circuit has held that a
24 corollary of this principle is that
25 where the official policy is one of

1 deliberate indifference to a known
2 overall risk of sexual harassment,
3 notice of particular harassment
4 situation and an opportunity to cure it
5 are not predicates for liability."

6 And it cites Simpson v. The University of Colorado,
7 Boulder. And that's the case, if you recall, where football
8 team at the University of Colorado had been harassing young
9 women, both recruits and players --

10 THE COURT: No. It seemed to me that the line of
11 cases that you are discussing did have pretty extraordinary
12 and egregious facts.

13 MR. I. ZALKIN: Right, they do. What they are
14 saying is when they have this overall policy of
15 indifference -- and we have alleged in this complaint that
16 the University has been audited, that as a result of a state
17 audit that deficiencies have been raised with the manner in
18 which it has either responded to complaints or prevented
19 discrimination.

20 We've alleged that there are 31 women who have filed
21 these Title IX administrative complaints. We've alleged
22 that they have policies and procedures that they have not
23 implemented correctly, that they have not followed.

24 It's not before the Court today, but just yesterday in
25 the Berkeley newspaper there was an article about a graduate

1 student who has filed a complaint with the OCR alleging that
2 the University hasn't taught graduate students their sexual
3 harassment policies and how to protect themselves from
4 sexual harassment.

5 So we are on the one -- the one path, path number one,
6 we are alleging we have this policy of deliberate
7 indifference.

8 THE COURT: Right. No, I understand that path.

9 MR. I. ZALKIN: Okay. And that as a result --

10 THE COURT: Let's go to the other path.

11 MR. I. ZALKIN: Okay. And as a result of that,
12 these three plaintiffs suffered --

13 THE COURT: I understand.

14 MR. I. ZALKIN: So to the individual cases with
15 respect to Ms. Karasek, what you have is first of all, she
16 was assaulted by a fellow student who was part of the
17 Democratic -- the club of the University, at a University
18 activity. They were in San Diego attending the Democratic
19 Party Convention. And as such, they were actually taking --
20 they were part --

21 THE COURT: I've read the complaint a bunch.

22 MR. I. ZALKIN: Okay.

23 THE COURT: And I've read the briefs a bunch. So
24 I don't need you to tell me what the facts are with respect
25 to these women.

1 MR. I. ZALKIN: Okay.

2 THE COURT: I'm interested though in the -- so I'm
3 zeroing in on the response of the Regents to the notice from
4 these three women. And to me that seems like your best
5 argument.

6 MR. I. ZALKIN: And I think it is. I mean they
7 clearly, in the cases that we've cited to the Court and in
8 the DCL, the Dear Colleague Letter -- which by the way, if I
9 can take a minute to address that, that's a significant
10 guidance document.

11 The defendants would like to suggest that that's just
12 mere suggestions, it's not controlling. And we're not
13 arguing that it per se raises legal liability in a civil
14 lawsuit for damages. But what we're saying is it is very
15 persuasive of the standard of care because it's a document
16 that is issued -- and these guidance documents are
17 periodically issued -- by the federal agency that is
18 responsible for the implementation of Title IX, for the
19 interpretation of Title IX, and for compliance, enforcing
20 compliance with Title IX.

21 They can take away the funding of this University if
22 there's a violation of those guidance standards. So these
23 are not de minimis. These are significant indicia of the
24 type of conduct that is expected of the University in
25 response to these complaints.

1 So they didn't follow any of those. In the case of Ms.
2 Karasek, first she was never even advised that she had a
3 right to file a formal complaint. She learned of that on
4 her own. That's not -- they are required to advise students
5 of the process and how to initiate a formal complaint.

6 THE COURT: What do you know of what the
7 University actually did at the moment? Have you done any
8 discovery -- do you have their documents?

9 MR. I. ZALKIN: We only know what our clients have
10 told us, your Honor. We haven't had an opportunity to find
11 out more informally at this stage.

12 So based on what we know now at the pleadings stage, we
13 know that they didn't advise Ms. Karasek of her opportunity
14 and her right to file a formal complaint. When she did file
15 a formal complaint, there was no response. Instead, they
16 engaged in a back-door deal with her perpetrator, which
17 clearly violates the DCL.

18 Page eight of the DCL lays out that there should never
19 engage in an informal process once a formal complaint has
20 been lodged. They can attempt pre a formal complaint to
21 mediate, and only if the victim is willing to do that.

22 If the victim decides they want to pull out of any
23 informal process and go to a formal complaint, that informal
24 process ends, according to what the OCR requires. They
25 didn't do that. They went into a back room, they cut a deal

1 with this guy. She has no idea what the outcome is. She's
2 supposed to be advised of the outcome.

3 There's no effort -- as far as she knows, there's
4 nothing they've done to stop him from -- issuing a stop
5 order or a stay-away order.

6 THE COURT: Let me stop you for a sec, because
7 you're ahead on points on this particular thing. I'm
8 interested most specifically now on any other arguments you
9 want to make with the causes of action.

10 Once Mr. Phillips argues on this, I'll give you a
11 chance to go back.

12 But I agree that the -- it is what the University did
13 or didn't do that you're entitled to know so that the claim
14 can go forward or not. That to me is what's important.

15 MR. I. ZALKIN: You don't want -- need me to talk
16 about Butler or comments --

17 THE COURT: I really don't.

18 MR. I. ZALKIN: All right. So what I'm dealing
19 with --

20 THE COURT: After Mr. Phillips, I'm sure you'll
21 have a few pointed things to say.

22 MR. I. ZALKIN: So after -- so what you're
23 struggling with is our state common law negligence claim and
24 why -- and Juarez essentially.

25 THE COURT: Yeah, not struggling much but --

1 MR. I. ZALKIN: Well, what I can tell you on that
2 is this is case where the University has been mandated under
3 Title IX to assume the responsibility, has the duty, the
4 statutory duty to protect their students from sexual or
5 gender discrimination including sexual violence and sexual
6 harassment.

7 They are required as part of that, under 34 CFR 106 --
8 I can give it to you but --

9 THE COURT: That's fine.

10 MR. I. ZALKIN: I can give it to you specifically.
11 I think it's 106(8)(b). They are required to educate their
12 students on how to protect themselves. So this is the
13 Juarez claim. This is the circumstance where you have known
14 sexual harassment and violence within the institution, as in
15 the Boy Scouts.

16 You have in this case a statutory obligation, not a
17 common law duty but a statutory duty to educate, to warn, to
18 train students on how to protect themselves. And they have
19 a failure on their part, or an allegation on our part that
20 they have failed to do that. And as a result of that, our
21 clients have been damaged.

22 So I think we have the elements of a state common law
23 negligence claim a la Juarez. It's a little bit different.

24 THE COURT: All right.

25 MR. I. ZALKIN: Broad -- you know, we cite the

1 Michael J. case. I think that distinguishes why Government
2 Code section 818.8 doesn't apply in this context.

3 It usually applies in the context where some lesser
4 lower-level employees are misrepresenting financial
5 conditions or something of that nature as opposed to
6 misrepresenting the safety of the university with respect to
7 how it handles and what it does to protect people from
8 sexual violence.

9 I think on the state claim I can see that we're done,
10 on the state Education Code claim.

11 THE COURT: Okay. Great. Thank you.

12 MR. PHILLIPS: Thank you, your Honor.

13 Just quickly before I forget, I just want to point out
14 that the Mansourian case, which I don't believe they cited
15 in the papers anywhere, is an instance of official
16 discrimination by the school alleged, not discrimination
17 based on failure to remedy teacher/student or student-on-
18 student harassment. It's a completely different issue from
19 the issue that we have here, completely irrelevant.

20 Your Honor, let me start by addressing the legal
21 standards for deliberate indifference because I don't think
22 they're quite as, I'll use the technical term, "loosey-
23 goosey" as counsel would suggest.

24 The Supreme Court in Davis said that the response to
25 known harassment, actual notice of harassment, in order for

1 there to be Title IX liability, the response must be clearly
2 unreasonable in light of the known circumstances. And the
3 courts have said that that's not just a reasonable standard.
4 It is stricter than that. It is an exacting standard.

5 And indeed the Ninth Circuit, quoting the Supreme
6 Court's decision in Gebser and characterizing Gebser the
7 same way the Davis court characterized Gebser, is that the
8 plaintiff has to plead facts sufficient to support a finding
9 that the college made an official decision not to remedy the
10 violation.

11 The cases -- the Fifth Circuit has said that actions or
12 decisions that are, quote, "merely inept, erroneous,
13 ineffective or negligent do not amount to deliberate
14 indifference." That's the Dallas Independent School case
15 that we cite.

16 And the Benicia School District case, the Eastern
17 District of California, said that even ineffective or
18 mistaken responses don't constitute deliberate indifference.

19 And the Davis court specifically said that the victims
20 of harassment are not entitled to make particular remedial
21 demands, and that, quote, "The courts should refrain from
22 second-guessing the disciplinary decisions made by school
23 administrators."

24 And in Oden, your Honor, there was a -- the Ninth
25 Circuit's case of Oden, there was a failure to follow the

1 university's -- the school's own policy with respect to
2 responding to complaints.

3 And the court said that that failure to follow their
4 own policy did not support the existence of a Title IX
5 violation. It's not a violation of Title IX to fail to
6 follow your own policies. It's only a violation of Title IX
7 if it satisfies the standards set out in Davis and the cases
8 that follow Davis.

9 The cases that principally they rely on with respect to
10 deliberate indifference, your Honor, the Jennings, the
11 Vance, the Morrell cases, those are situations where either
12 the school failed to take any action to remedy a violation
13 or where remedial action was deemed to constitute deliberate
14 indifference where the same perpetrator committed acts of
15 harassment after the school was on actual notice of his
16 prior acts. Neither of those things are alleged here, your
17 Honor.

18 And, your Honor, with respect to the Department of
19 Education Dear Colleague Letter, the letter itself very
20 carefully said that it does not add requirements to
21 applicable law.

22 So what your Honor needs to look to is the applicable
23 law and court decisions and not whatever the Department of
24 Education's letter may say. And that it sets forth the
25 standard for administrative enforcement of Title IX. And in

1 court cases where plaintiffs are seeking injunctive
2 relief -- and that, quote, the standard in private lawsuits
3 for monetary damages is actual knowledge and deliberate
4 indifference, not what appears in the Department of
5 Education's Dear Colleague Letter.

6 And indeed, your Honor, in Gebser, the Supreme Court
7 held that failure to comply with the Department of
8 Education's regulations -- the Dear Colleague Letter is not
9 a regulation. It's just guidance put out by the Civil
10 Rights Office -- that failure to comply with the regulations
11 does not give rise to a claim for deliberate indifference.

12 So certainly, your Honor, if that can't give rise to a
13 claim for deliberate indifference, failure to comply with
14 the DOE guidance letter can't give rise to a claim for
15 deliberate indifference.

16 Your Honor, with respect to -- they also -- they make
17 an argument, your Honor, with respect to a delay, allegedly
18 delaying in responding, and I'll come back to that. But in
19 Oden, your Honor, the Ninth Circuit was very clear.

20 There had been a nine-month delay in doing anything in
21 Oden, and the court said -- and that was a violation of the
22 school's policy as well as being a nine-month delay. And
23 the court said that that did not give rise to a Title IX
24 claim unless -- unless the plaintiff showed that, quote,
25 "The delay was a deliberate attempt to sabotage plaintiff's

1 complaint or its orderly resolution." That's when delay can
2 constitute a violation of Title IX.

3 Now, with those standards in mind, your Honor, let me
4 turn to what's alleged in the complaint, which as we all
5 know we have to take as true what's alleged in the
6 complaint.

7 With respect to Ms. Karasek, she affirmatively alleges
8 that the University did conduct an investigation and did
9 discipline her alleged harasser.

10 Paragraph 19, she alleges the University was preparing
11 to respond to her.

12 Paragraph 20, she alleges the matter had been explored
13 and resolved and an outcome communicated to the Center for
14 Student Conduct.

15 Paragraph 22, she alleges that her harasser had been
16 charged with violating and found in violation of the campus
17 Code of Student Conduct.

18 And in paragraph 25, she alleges that he was placed on
19 disciplinary probation and engaged in counseling measures.

20 She alleges all of those things. That is clearly
21 contrary to the notion that the University made a decision
22 not to remedy the situation, not to investigate, not to
23 discipline.

24 And to the extent the Court or anyone else may disagree
25 with a particular discipline that was imposed on her

1 harasser, that's not an issue for the Court. The Supreme
2 Court is very clear about that, your Honor. The Ninth
3 Circuit's been very clear about that. The courts are not
4 supposed to second-guess what the university does if they do
5 something in terms of investigating and disciplining.

6 Ms. Commins affirmatively alleges, again, that there
7 was an investigation and discipline imposed, that she
8 received a phone call from the Title IX office. She's not
9 sure whether it's the Title IX office or the Office of
10 Student Conduct. And she was told that the University would
11 conduct an investigation after the police finished their
12 investigation.

13 Now, there seems to be a complaint to some extent about
14 the fact that the University didn't pursue its investigation
15 while the police were doing so. I would just point out that
16 in fact the Dear Colleague Letter specifically says that
17 universities, schools should in fact defer to police
18 investigations for obviously good reasons, your Honor.

19 But then she alleges affirmatively, paragraph 62, that
20 her alleged harasser was suspended until after the fall of
21 2015 when she was scheduled to graduate, that he was
22 suspended, that he was required to complete a writing
23 assignment, that he was prohibited from contacting her and
24 placed on disciplinary probation for the rest of his studies
25 at U.C., your Honor.

1 Neither of those with respect to Ms. Karasek or Ms.
2 Commins are clearly unreasonable responses or a decision not
3 to remedy a violation. Even if one thought that they were
4 ineffective, negligent, erroneous or whatever else, that
5 would not give rise to a Title IX claim. The courts have
6 been clear about that. The complaint establishes that U.C.
7 responded in a manner that eliminates any Title IX liability
8 here, your Honor.

9 And, your Honor, with respect to Ms. Butler,
10 respectfully -- and I emphasize that in light of the
11 afternoon session -- respectfully disagree with your Honor's
12 conclusion in that regard.

13 There is nothing in the complaint that in any way
14 suggests that the University of California exercises any
15 control whatsoever about the alleged harasser in this
16 instance. He is not an employee of the University, he is
17 not an agent of the University. The alleged harassment took
18 place in a context over which the University had no control.

19 She was a student at the University who was doing
20 research with a Ph.D. candidate at a center not owned,
21 controlled or otherwise managed by the University.

22 THE COURT: But advertised by.

23 MR. PHILLIPS: Your Honor, if the University is
24 responsible for what goes on at every place where it may say
25 students can go and receive clinical experience or --

1 THE COURT: Well, Mr. Phillips, that would be one
2 thing but he's a guest lecturer -- he's alleged.

3 MR. PHILLIPS: He is alleged to have perhaps been
4 a guest lecturer.

5 But, again, your Honor, if the University liable for
6 what every guest lecturer that they ever invite to the
7 University did somewhere else, outside of their control,
8 then I think that's going to substantially change the way in
9 which universities go about their business, because you then
10 have to do essentially a check on everything this person has
11 ever done before you invite them to be a guest lecturer at
12 your school.

13 There is nothing in the complaint whatsoever --

14 THE COURT: This though, Mr. Phillips -- I don't
15 know. I think you're --

16 MR. PHILLIPS: There's no allegation that he was a
17 guest lecturer after they had notice that of the alleged
18 harassment, your Honor. No such allegation.

19 Perhaps that would create a new issue, but there's no
20 such allegation that he was invited as a guest lecturer
21 after the allegations against him were made.

22 So I would submit, your Honor, that it's very clear. I
23 would point your Honor to -- Oden says that damages are
24 available only if an official who at minimum has authority
25 to address the alleged discrimination and institute

1 corrective measures.

2 There is no allegation that the University had any
3 authority over her alleged harasser to suspend him, to
4 discipline him, to do anything with respect to him. Perhaps
5 you could say that they had obligation not to invite him to
6 be a guest lecturer, but there was no allegation that he was
7 invited to be a guest lecturer.

8 There is nothing they could have done with respect to
9 that individual, your Honor. In Ostrander, the Ninth
10 Circuit's decision in Ostrander, there was a judgment in
11 favor of the university on a Title IX claim arising from a
12 sexual assault in an off-campus building because the
13 university did not own, possess or control the building.
14 Similarly here, the University had no ownership, control or
15 possession of the center where this occurred.

16 In Clifford, your Honor -- in Clifford we had a Title
17 IX claim where there was a sexual assault during a
18 fraternity retreat at Lake Tahoe, a university fraternity
19 retreat. And the claim was dismissed because the university
20 didn't have control over that context.

21 So, your Honor, I think it's clear that in fact with
22 respect to Ms. Butler, there's simply no showing of an
23 ability to control or an ability to discipline the harasser.
24 There is essentially nothing the University could have done.

25 So I think with respect to the particular circumstance

1 argument that we have, it's two prongs, the ones with
2 particular circumstances here.

3 The complaint itself -- they don't need discovery, your
4 Honor. The complaint itself establishes that the University
5 did respond, that they disciplined the individuals in the
6 two instances and in the other instance, there's no control,
7 no authority to do anything and therefore no Title IX claim.

8 Your Honor, with respect to whether or not Ms. Karasek
9 and Ms. Commins were informed as quickly as they might have
10 liked about what was going on, there is no law that I'm
11 aware of that suggests the University has a duty under Title
12 IX to inform the accused about the progress of the
13 investigation.

14 No case that suggests that liability can be based upon
15 the fact that notwithstanding you did an investigation and
16 notwithstanding the fact that you in fact imposed
17 discipline, that because you didn't tell the person along
18 the way what you were doing, that somehow that gives rise to
19 liability, that somehow that constitutes deliberate
20 indifference.

21 The question isn't whether you were deliberately
22 indifferent somehow to the complainant. The issue is
23 whether you were deliberate indifference to the allegations
24 of harassment. And it's clear from the complaint here the
25 University of California was not deliberate indifference to

1 these allegations.

2 Turning to the -- excuse me, a little bit of a -- would
3 you mind if I got a little water?

4 THE COURT: The hour is late.

5 MR. PHILLIPS: Turning to the policy argument,
6 there is no authority whatsoever for the proposition that a
7 Title IX claim in these circumstances can be based upon some
8 general inadequacy of a university's training or dealing
9 with alleged -- allegations of sexual harassment.

10 Again, the Ostrander decision of the Ninth Circuit I
11 think in this area is very instructive, your Honor.

12 There, the court held that the plaintiff could not
13 satisfy Davis's actual knowledge requirement by showing that
14 there had been prior complaints of sexual abuse by members
15 of a particular fraternity, when those complaints were not
16 about the same fraternity member or the same location as the
17 abuse was subject of the Title IX claim.

18 So you have a claim there that the university had
19 failed to deal adequately with abuse by a different
20 fraternity member. And the court said no, that's not
21 enough. You have to have an allegation about the particular
22 person or context.

23 And, your Honor, with respect to the Simpson case. I
24 mean the Simpson case is a pretty egregious set of facts, as
25 I think you may have suggested.

1 THE COURT: You don't really need to argue this.

2 MR. PHILLIPS: Okay. Thank you. That's a
3 completely different situation and has been limited to
4 situations where there's potentially a policy of encouraging
5 the activity that has resulted in sexual harassment.

6 There's no even remotely similar allegation here, your
7 Honor.

8 So with respect to the deliberate indifference point,
9 your Honor, I think under Davis, under the Oden case and
10 under all the other cases we cited, your Honor, it's clear
11 from the face of the complaint that there was deliberate
12 indifference to these allegations of harassment, your Honor.

13 Let me turn, if I could -- and, your Honor, with
14 respect to the policy argument, I would just -- I think it's
15 sort of patently --

16 THE COURT: You don't actually need to argue the
17 policy argument.

18 MR. PHILLIPS: Okay. I was going to say that
19 opens a can of worms that seems rather obvious.

20 Your Honor, with respect to the causation issue, I
21 would like to address that, if I may.

22 Because the Ninth Circuit's held in Reeves that where
23 there was no evidence that any harassment occurred after the
24 school learned of the plaintiffs' allegations the school
25 cannot be deemed to have, quote, "subjected the plaintiffs

1 to harassment." That's what the Ninth Circuit said in
2 Reeves.

3 And we have cited numerous other cases, your Honor,
4 where Title IX claims were dismissed because there was no
5 allegation of further harassment or deprivation of rights
6 after the institution was put on notice of the harassment.

7 We cited a number of those. There is no such
8 allegation of further harassment after the University was
9 put on notice of the allegations except, your Honor --
10 except -- and I don't think this is an allegation of further
11 harassment. But there is an allegation that I believe Ms.
12 Commins or Ms. Karasek, possibly both, basically felt
13 uncomfortable because they thought the person might still be
14 around.

15 Well, your Honor, the Yoona Ha case -- Ha versus
16 Northwestern University, in that case the court specifically
17 said, your Honor, that, quote, "If plaintiff claims that
18 knowledge of Ludlow's presence on the campus caused her
19 considerable grief, that is not actionable under Title IX."

20 And your Honor, there are other cases -- I'm not
21 sure -- I think two of these may or may not have been cited
22 in our papers -- where even the fact that the complainant
23 actually saw the alleged harasser on campus the complaint
24 had been made -- which is not alleged here. There's no
25 allegation that there was ever any contact whatsoever after

1 the allegations were made.

2 But even in situations where there was, in Frazier v.
3 Temple University, which is 25 F.Supp.3d 598, at page 614,
4 Eastern District of Pennsylvania, your Honor, dismissed the
5 claim where the plaintiff alleges that her harasser, quote,
6 "followed her, sat outside her dormitory and stood directly
7 beside her in the cafeteria and stared at her" after the
8 allegations had been made. And the court held that that did
9 not state a claim under Title IX.

10 THE COURT: I might have found differently.

11 MR. PHILLIPS: Hmm?

12 THE COURT: I think I might have found differently
13 but --

14 MR. PHILLIPS: I understand you might have, your
15 Honor. But of course we don't have anything close to those
16 facts here either.

17 All I'm saying is in these cases, which go well beyond
18 anything that's alleged here after the allegations, even in
19 those cases, there was a finding that there wasn't Title IX
20 liability.

21 But in the O'Hara case which is 2002, U.S. District
22 Lexus 12153 at star 18 to 19, if I'm reading my own writing
23 correctly, your Honor -- I hope -- the plaintiff alleged her
24 harasser, quote, "could occasionally be found in the same
25 vicinity and that he would stare at her," closed quote. And

1 again, it rejected Title IX liability based on that.

2 And here, your Honor, we have not even that. We have
3 simply a thought that maybe this person was around here
4 somewhere, even though Ms. Commins that her alleged harasser
5 had been told not to have any contact with her.

6 Your Honor, the notion -- if a university can be liable
7 under Title IX for causing further harassment by virtue of
8 the fact that the alleged harasser may have remained on
9 campus after the allegations of harassment were made, the
10 only way to cure that for a university, your Honor, would
11 almost certainly be to violate the constitutional rights of
12 the alleged harasser and order him off of campus without any
13 due process, because you'd -- assume you'd have to do an
14 investigation and have a hearing and allow him to present
15 his side of the case, or her side of the case potentially of
16 course, before you do that.

17 So that if -- if allowing a Title IX claim to proceed
18 based on that alone has subsequent harassment, your Honor,
19 again creates an enormous can of worms that would put the
20 universities in the situation between arguably violating the
21 Title IX rights of the accuser and almost certainly
22 violating the constitutional rights of the alleged harasser.

23 And, your Honor, they've cited some cases, the Williams
24 case out of the 11th Circuit. The Williams case, your
25 Honor, is the situation where prior to her harassment --

1 harassment of the plaintiff in that case -- the university
2 that actual knowledge that one of her harassers had had a
3 history of sexual misconduct and had failed to respond to
4 allegations about that particular person.

5 And contrary to what I think is suggested in their
6 papers, it's not our position -- I don't know if facts
7 like -- certainly I'm not aware of a situation like this
8 right now, but that it may well be that if a student
9 complains that student "X" has harassed, you know, students
10 and the university does not do anything about that and
11 student "X" then harasses or assaults another student,
12 that's a completely different situation. That may fit
13 within Williams, your Honor, but that's certainly not the
14 situation here.

15 So there's no showing whatsoever of any cognizable
16 harassment after the University is put on notice of these
17 allegations. There's not even any allegation that any of
18 the plaintiffs ever saw any of these people again. Far less
19 that they were subjected to harassment as a result of
20 something that the University did or didn't do, your Honor.

21 So --

22 THE COURT: All right. Well, thank you, Mr.
23 Phillips.

24 MR. PHILLIPS: I won't bother with the state
25 law --

1 THE COURT: That would be good.

2 MR. PHILLIPS: -- causes of action, if that's all
3 right. Thank you very much.

4 MR. I. ZALKIN: That was a lot.

5 THE COURT: That was a lot and I'll give you no
6 more than 10 minutes, hopefully less, to respond to this,
7 Mr. Zalkin.

8 MR. I. ZALKIN: All right. I'm going to do my
9 best, your Honor.

10 I'll work backwards. On this issue of causation,
11 counsel referenced there are principally two cases that they
12 rely on. Reese. In Reese, that was a circumstance where
13 some high school girls hid in the boys' bathroom on senior
14 ditch day and four days after, school was done, classes were
15 never --

16 THE COURT: No, I remember the case.

17 MR. I. ZALKIN: It has nothing -- there was no
18 potential for further harassment.

19 And the standard is not were they subsequently harassed
20 or harassed after a failure to respond to their deliberate
21 indifference. The standard is was there subsequent
22 harassment or were they made vulnerable to subsequent
23 harassment.

24 And counsel seems to suggest that, well, it's not a big
25 deal for someone who has been violated sexually, physically

1 violated -- remember, the guy who abused Karasek abused
2 three other women. There were four complaints.

3 THE COURT: I remember the facts.

4 MR. I. ZALKIN: So the --

5 THE COURT: So the case that you're relying on for
6 causation by being made to feel vulnerable, which --

7 MR. I. ZALKIN: That's Davis, under Davis. That
8 is exactly the standard under Davis is that they are subject
9 to harassment or being made vulnerable to harassment.

10 And in this case -- so the other case they rely on is
11 this Lopez case. And in Lopez, unfortunately that was a
12 case where there was domestic violence between two students.
13 One was a graduate student teacher, and she dies in a car
14 accident. When he's drunk, he's driving, she dies in a car
15 accident. And the parents claimed she lost -- that further
16 harassment in the sense that she lost her opportunity to
17 continue living in student housing.

18 And the court said well, that causation -- there's an
19 intervening cause and that's the car accident. It wasn't
20 because of further harassment.

21 But on the other hand, we have cited to the Court cases
22 that are right on the money with respect to that issue. In
23 Doe v. Derby, that's the case where there was a 17-year-old
24 high school kid who was abusing a 13-year-old middle school
25 kid. The schools were merged, they were in the same

1 complex, the same building. And he was allowed to remain on
2 the campus.

3 And the court said there, just the mere fact that you
4 have this guy who has sexually harassed this young girl
5 still on campus is enough to make her vulnerable to further
6 harassment. That doesn't have to be that.

7 There was a misstatement on the facts. There's no
8 evidence that Ms. Commins ever knew that at any time the
9 school had advised her harasser or her abuser to stay away
10 from her. There's no such allegation. She learns that that
11 was supposedly done almost a year later. But until then
12 there's no communication.

13 In terms of this question of deliberate indifference
14 and what the importance of these regulations are, in 106 --
15 citation for that. In 106.8(b), the school is required to
16 engage in prompt and equitable investigation and resolution
17 of a complaint. Prompt and equitable.

18 And the guidelines, the DCL is very clear that that
19 should include a formal process where the complainant, the
20 victim, is included in the process where both sides can
21 present witnesses, both sides can present evidence, where
22 there's a right to appeal. That is what is required.
23 That's what the guidelines actually require.

24 It is important -- counsel says well, it doesn't matter
25 what the victim knows. The indifference is to the victim,

1 to be indifferent to this person that just was assaulted and
2 to leave them completely out of the process. To enter into
3 back-door deals and not advise them of the process at all is
4 completely contrary to what is clearly reasonable or what is
5 reasonable and what the DCL required.

6 It requires that they be involved. It requires that
7 they be on notice of the process and on notice of the
8 outcome and have the right to appeal if they so choose, as
9 does the accused. That's due process. That's clearly
10 reasonable.

11 The test for deliberate indifference is, on the facts
12 as we know them, was the person who had the ability to
13 remedy the situation reasonable in the way they responded or
14 not. That is the Davis test for what is deliberate
15 indifference. Were they reasonable or were they clearly
16 unreasonable.

17 And all we're saying is these are indicia of what is
18 reasonable.

19 Oden, the case that defendants rely on, Ninth Circuit
20 case. What happened in Oden? It was at Northern Marianas
21 College, a young woman is assaulted by her music teacher.
22 She reports it. Immediately -- immediately the university
23 assigns her two counselors to help her psychology, to help
24 her prepare and submit a formal complaint.

25 They serve the college professor with the formal

1 complaint. They serve him with a stay-away order. And they
2 remove her from his class.

3 There was a delay to the point where they had the
4 ultimate nine-month delay for the hearing. And they
5 believed her in the hearing and they disciplined him. And
6 her beef was it took nine months to get there.

7 But the court -- on the facts, she moved from the
8 Marianas Islands halfway across the world to New Mexico
9 during that period of time, and she wanted a lawyer which
10 took time.

11 So in part, the delay was due to her situation. And the
12 court did say that this is not to say that delay alone
13 cannot rise to the level of clearly unreasonable -- or to
14 deliberate indifference. That was the Ninth Circuit.

15 I'm taking more time I think than you want. I mean
16 there's a lot more I could say.

17 THE COURT: All right. Well, I think you've said
18 it in a variety of ways. And I think Mr. Phillips had a
19 good opportunity to present his argument, and I don't need
20 any more.

21 So thank you both. I know that you each could go on
22 for quite a while and I would be enlightened by what you
23 have to say, but it's been a long afternoon.

24 I appreciate the argument that you have made. And I'll
25 try and get an order out very soon.

1 MR. I. ZALKIN: Appreciate your time, your Honor.
2 Thank you very much.

3 MR. PHILLIPS: Thank you, your Honor.

4 THE COURT: Thank you.

5 (Proceedings adjourned at 5:26 p.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



Echo Reporting, Inc., Transcriber

Monday, July 11, 2016